IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 825.

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD EDUCATION SOCIETY ET AL.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 86 F. (2d) 692 and in the record at 486.

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Second Circuit was entered December 21, 1936 (R. 493). Petition for certiorari was filed March 19, 1937. The jurisdiction of the court is invoked under Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45), and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347 (a)).

QUESTION PRESENTED

The petition herein formally presents (p. 2) but one question to this court. That question is, in the

opinion of respondents, improperly stated and should be rephrased accurately to express the opinion of the court below which the Solicitor General now seeks to have this court review. Accordingly, to be correctly stated it should read as follows:

Does the sales practice of representing to prospective purchasers of ten volume sets of encyclopedias with loose leaf quarter-annual supplements for a ten year period which gives the buyer ten additional volumes, that they are to receive the encyclopedias free and pay only for the loose leaf quarter-annual supplements, constitute an unfair method of competition in commerce within the meaning of Section 5 of the Federal Trade Commission Act?

The court below did not hold that such representations were false. The petitioner is wholly without warrant to assume what it must prove. Overruling the Commission, the lower court unanimously stated:

> "We cannot take seriously the suggestion that a man who is buying a set of books and a ten years' 'extension service', will be fatuous enough to be misled by the *mere statement* that the first are given away, and that he is paying only for the second. Nor can we conceive how he could be damaged were he to suppose that that was true. Such trivial niceties are too impalpable for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils" (R. 489). (Italics supplied.)

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act approved September 26, 1914, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45) is printed in the Appendix, *infra,* pp. 15-18.

STATEMENT

The original and supplemental complaints herein (R. 2, 20) concerned eight alleged unfair methods and in the cease and desist order entered against respondents (R. 78) there are ten paragraphs covering these eight separately alleged unfair methods of competition. However, despite the fact that petitioner has presented to this Court as the sole question involved, only one of the separately alleged unfair methods of competition which the court below held, as a matter of law, was not an unfair method of competition, the petitioner has in its statement developed all the facts as to all of the methods that were in the case whether relevant or irrelevant to the lone question it has presented.

Respondents submit that Supreme Court Rule 27 in so far as the statement of the case is concerned has been completely disregarded by the Solicitor General. Petitioner should not burden the court with facts and supposed errors which are not material to the specific question the Solicitor General has chosen to present to this Honorable Court.

The facts material to the particular question can thus be summarized. The respondent corporations, Standard Education Society and Standard Encyclopedia Corporation, are engaged in the compilation, production and sale of ten volume sets of encyclopedias, sold together with a ten year loose leaf extension service consisting of quarter-annual supplements which at the end of ten years comprises ten additional volumes of encyclopedic material, thus making a total of twenty volumes (R. 8, 27). Respondent, H. M. Stanford is president, director, general manager, and a stockholder of respondent Standard Education Society (R. 2, 12, 379, 382, 412, 429). Respondent, W. H. Ward is vice-president, director and a stockholder of

Standard Education Society (R. 30, 383, 424) and respondent A. J. Greener is the auditor, cashier and a stockholder of Standard Education Society (R. 467). Greener was a mere employee and not a director (R. 436, 437, 467).

The Federal Trade Commission in its original and supplemental complaints alleged, *inter alia,* that respondents represent to prospective purchasers of the ten volume sets of encyclopedias together with the loose leaf quarter-annual supplements for ten years, that the encyclopedias are being given away and that the purchasers are paying only for the ten year loose leaf quarter-annual supplement service. The Commission says these representations are false and misleading because the books are not given away, the price asked being the regular price of the encyclopedia with the loose leaf service. On the basis thereof, the Commission issued an order which in so far as is here pertinent directed the respondents to cease and desist from:

> "(1) Advertising or representing in any manner to purchasers or prospective purchasers that any books or set of books offered for sale and sold by them will be given free of cost to said purchasers or prospective purchasers, when such is not the fact."
>
> "(3) Advertising or representing in any manner that purchasers or prospective purchasers of respondents' publications are only buying or paying for loose-leaf supplements intended to keep the set of books up-to-date for a period of ten years, when such is not the fact."

The order was issued December 24, 1931. Nothing was done to enforce this order until January 20, 1936, when the Commission filed with the Circuit

Court of Appeals for the Second Circuit its application for the enforcement of the aforesaid order in all its particulars. Respondents properly answered and the case was argued. On December 14, 1936, the court below handed down its opinion striking from the order the paragraphs above set forth which it ruled did not, as a matter of law, amount to an unfair method of competition (R. 486, 493). It also eliminated paragraph 8 of the order because there was no evidence at all to support that paragraph. The court affirmed in full most of the other parts of the order and modified a few in part. However, as to the parts affirmed, the court below, before decreeing enforcement of the desist order, remanded the cause to the Commission as Special Master to report whether the respondents have complied with the sustained provisions, in accordance with Section 5 of the F. T. C. Act and its long settled and undisturbed procedure (*F. T. C.* v. *Paul Balme* (C. C. A. 2, 1928), 23 F. (2d) 615, cert. den. 277 U. S. 598). The court directed that: "The cause will await in this court the return of that report for further proceedings" (R. 492, 495). Consequently, the decision of the court for the most part is interlocutory. It is final only as to the specific question presented at this time and as to some minor and inconsequential details which are unsupported, in the opinion of the court below, by any evidence.

PETITIONER'S SPECIFICATION OF ERRORS

Although petitioner on page 11 of its petition herein, sets forth ten alleged errors of the court below, only one of them (number one) refers to the question formally presented to the court. The others should be disregarded for this Court has refused to consider any errors not involved in the question presented to

it in the petition. In *Helvering* v. *Taylor,* 293 U. S. 507, 511, the court said:

> "The only question for consideration is that stated in the petition for certiorari."

Furthermore, "Errors" 2 to 10 are not of a character to justify any attention from the court. Thus, "Errors" numbered 2 to 5 concern rulings by the court below on questions of fact which do not warrant review of this case and which will not be disturbed by this Court in any event. "Errors" numbered 6 to 8 refer to a question of practice and procedure, settled by the court below in *F. T. C.* v. *Paul Balme* (C. C. A. 2, 1928), 23 F. (2d) 615, cert. den. 277 U. S. 598, and followed and applied in *F. T. C.* v. *Baltimore Paint and Color Works* (C. C. A. 4, 1930), 41 F. (2d) 474, 476. The last two alleged errors (numbers 9 and 10), are mere formal conclusions based on the preceding errors.

ARGUMENT

I.

No substantial question of law is involved herein.

The Solicitor General in his Argument has ingeniously assumed that the court below decided that respondents made false representations in their sales talks, but held that even if they did make false representations, such false representations do not amount to an unfair method of competition. The court below did not so decide. Its plain and direct decision is entirely inconsistent with any such interpretation. It was not predicated upon the premise that respondents made false representations in their sales talks.

As a matter of fact, the question presented to this Honorable Court by petitioner is, in the unanimous opinion of the court below, a "trivial" nicety and a "will-o'-the-wisp" rather than a substantial question of law. The practice involved bears no indicia of fraud or deceit, is not *contra bonos mores* and could not possibly mislead or damage a purchaser. It is an innocuous sales approach and merely enables a salesman to gain an audience more readily by offering one part of a combination "free" on condition that the purchaser pay for the other part. A community which sells for profit must give a trader some leeway in the sale of his wares so long as his methods are not fraudulent, deceptive or immoral.

Is it unfair for a trader to offer a toothbrush "absolutely free" with every purchase of a tube of toothpaste? The cost of the brush is, of course, absorbed in the price requested for the paste. Yet where is the deception or damage? Is it unfair for a book club to advertise that a book will be given free upon joining the club? These examples may be multiplied a thousand fold. This type of advertising appears regularly in all current magazines, in our leading daily and Sunday newspapers and is inserted by hundreds of our foremost manufacturers and merchants. The Court should take judicial notice of these advertising methods. Such sales inducing practices, acquiesced in and established from a time "when the memory of man runneth not to the contrary", do not deceive or damage prospective purchasers and should not be the concern of this Court.

The respondents for over twenty-five years have developed a fine ten volume encyclopedia which itself undergoes revision every other year and is continually kept up-to-date by means of a quarter-annual supplement. These supplements, by keeping the in-

formation under the subject headings of the encyclopedia, add to the encyclopedic matter as outstanding events in world affairs occur. The buyer wants up-to-date information under the encyclopedic headings treated in the ten volumes. He does not want the ten volumes without the quarterly service. These two items, the ten volumes and the quarterly supplement, are sold together and are inseparable. When the ten years of quarterly supplements have been furnished, the buyer then has twenty volumes of encyclopedic information, each year's quarterly being the size of one of the ten original volumes.

The respondents' salesmen said to prospective purchasers: "We offer the books 'free' if you buy the quarter-annual supplements which come to you over a period of ten years." At once, the buyer, examining the sample of the quarterly supplement and a volume of the encyclopedia, notes the unmistakable fact that the "free offer" cannot be divided into parts. Because, the word "free" if left by itself does not contain the substantive idea embodied in the proposed contract. It is "free" only on condition, for the word "free" standing alone does not make sense. The supplement and the ten volumes go together, like cream served with coffee. There is no quality of falsity in the salesmen's offer. The whole picture is clear. The buyer knows what he is getting and how much he is paying. He knows that he is not getting something for nothing, for he is told he must pay a substantial amount to get that which is described as "free". That is why Judge Learned Hand writing the opinion for the court below rightfully said that the Federal Trade Commission in examining sales efforts should not "bring a pedantic scrupulosity" to its tasks and that "too solicitous a censorship is worse than any evils it may correct" (R. 489).

The Court is now asked to consider and review what the lower court considered "will-o'-the-wisps" (R. 489), rather than a serious unfair method of competition substantially affecting commerce.

The question here presented to the Court is highly inconsequential and merits no review. This is not a case of misleading the public such as the case of selling cotton for wool (*F. T. C.* v. *Winsted Hosiery,* 258 U. S. 483, 493, 494), nor a case where children are cheated and the gambling spirit instilled (*F. T. C.* v. *Keppel,* 291 U. S. 304). Here we have simply the question of a purchaser seeking to buy an encyclopedia with loose leaf quarter-annual supplements for a ten year period, who obtains exactly what he wants for a price he evidently believes to be reasonable, and for which he signs a written contract. No one is or can be misled or damaged by the salesman's mere statement that the purchaser is paying the price for only one of the inseparable items he desires.

The court below, when it examined the record, found no credible evidence to the effect that any one had been misled or damaged by the statements that the encyclopedia was being given away and that only the supplements were being paid for. Petitioner's record citations on page 13 of its petition do not support a contrary contention. Not one of the instances cited proves that a purchaser was misled or damaged. The citations merely establish what is not contested, viz., that the "free goods on condition" representations were made, a far cry indeed from deceit and damage.

The decision of the court below does not rest upon the fancied ground stated by the Solicitor General (Petition, p. 13), *i. e.,* that if misrepresentations are so obviously false that the court believes a man would be fatuous to believe them, they do not amount to an unfair method of competition. It is highly unjust

for petitioner to assume that the lower court applied a hitherto unheard of rule of law. What the court below clearly did hold was that in its opinion no one could be misled by the mere statements of the respondents, and that in any event no one could possibly be damaged by the practice involved, and therefore no violation of Section 5 of the F. T. C. Act existed. In other words in the court's opinion, the practice involved no falsity, no misrepresentation, no deceit and above all, no possible damage to the purchaser.

And, if there is no deception or damage, why should the practices be deemed an unfair method of competition in commerce and within the jurisdiction of the Federal Trade Commission! Truly, such practices are of the kind *de minimis non curat lex,* and, as the lower court stated, "too impalpable for practical affairs", merely serving to divert the Commission's attentions from substantial evils that restrain trade or tend to create a monopoly in interstate commerce.

II.

There is no genuine conflict of decisions.

There is no real conflict between the instant decision and the decision of any other Circuit Court of Appeals on the question presented. "Free goods on condition" sales advertising has never been condemned, when standing alone, by any court as an unfair method of competition.

While the case of *Consolidated Book Publishers, Inc.* v. *F. T. C.* (C. C. A. 7), 58 F. (2d) 942, cert. den. 286 U. S. 553, had in it a "give away" talk, the court in that case did not attempt to analyze this separately alleged unfair method of competition. It

looked rather at the other and more serious practices involved in that case and affirmed the entire order. The *Consolidated* case, as the court below said, *"was complicated by a number of graver practices which probably colored the whole"* (R. 489).

In the instant case, the court decided to and did take up each paragraph of the order independently so as to determine whether the methods forbidden by the Commission were, as a matter of law, unfair methods of competition. This is the recognized duty of the Circuit Court of Appeals in dealing with Commission desist orders.

F. T. C. v. *Gratz, et al.*, 253 U. S. 421;
F. T. C. v. *Curtis Publ. Co.*, 260 U. S. 568.

The paragraphs of the desist order which the court believed were supported by evidence and constituted unfair methods of competition in commerce, it affirmed. Paragraphs 1 and 3, dealing with the question here presented, *i. e.*, "free goods on condition" sales advertising, did not in the court's opinion amount to an unfair method of competition and it therefore struck these two paragraphs from the Commission's desist order. Hence, the case at bar and the case of *John C. Winston Co.* v. *F. T. C.* (C. C. A. 3), 3 F. (2d) 961, cert. den. 269 U. S. 555, with which the instant case is in complete harmony, are the only decisions wherein the question here presented was ever considered by itself to determine whether it was an unfair method of competition. In both cases the courts concluded that the practice was not an unfair method of competition.

The reasoning of the court below in this regard is clear and logical and is not in conflict with any other decision, for no decision exists where the question involved was condemned when considered by itself,

as did the court below and as this Court is now asked to do.

A great portion of the argument and the briefs, in the court below, was devoted by both sides to comparing the *Consolidated* case with the facts in the instant case. After most careful consideration, the court held that it did not believe that the court in the *Consolidated* case would have held the "bare practice" (i. e., the question here presented) bad if that case were stripped of its graver practices (R. 489). Respondents submit that there is no genuine conflict of decisions on the "bare practice" which petitioner has presented to this Court for consideration.

III.

Petitioner's alleged "errors" 2-10, are immaterial.

Respondents have not presented any argument upon petitioner's alleged errors which do not relate to the sole question here presented, because respondents do not believe that the errors, listed on page 11 of the petition and numbered two to ten, are properly before the court. Furthermore, these alleged errors relate merely to facts and an unimportant matter of procedure which this Court will not disturb. Evidently that was why petitioner did not embody these alleged errors into a question for the court to decide, but merely urged them to color the case and omitted to support their specification by any argument.

IV.

Decision should not be disturbed.

Respondents do not believe that the unanimous opinion of the court below forbidding "a pedantic

scrupulosity" on the part of one of our government's subordinate agencies in its policing of business, should be disturbed.

CONCLUSION

The decision of the court below on the question presented is correct. No genuine conflict of decisions exists. The question presented involves no issue of substance or of sufficient general importance worthy of review by this Court. The petition should therefore be denied.

Respectfully submitted,

HENRY WARD BEER,
Counsel for Respondents.

April, 1937.

APPENDIX

Section 5 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717, 719, U. S. C., Title 15, Sec. 45) is as follows:

That unfair methods of competition in commerce are hereby declared unlawful.

Power to prohibit.—The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Procedure by commission.—Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced

to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

Enforcement of orders.—If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting

aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Application to set aside order.—Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an

application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

Jurisdiction of court.—The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

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